Supreme Court, U.S.
FILED
NOV 17 2003
OFFICE OF THE CLERK

No. 03-573

IN THE

SUPREME COURT OF THE UNITED STATES

ESSEF CORPORATION, PAC-FAB, INC., AND STRUCTURAL EUROPE, N.V.,

Petitioners,

v.

JOHN AND JOYCE SILIVANCH, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 14, 2003

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QUESTIONS PRESENTED

WHETHER PETITIONERS' CLAIMS OF ERROR IN THE APPLICATION OF *PIONEER INVESTMENT SERVICES CO. V. BRUNSWICK ASSOCIATES, LTD. PARTNERSHIP*, 507 U.S. 380 (1993) WARRANTS REVERSAL OF THE SECOND CIRCUIT'S FINDING THAT AN ATTORNEY'S FAILURE TO COMPLY WITH A CLEAR AND UNAMBIGUOUS JURISDICTIONAL RULE WOULD NOT BE EXCUSED?

LIST OF PARTIES

In addition to the parties listed in the caption, the following are also parties:

Felice and Frances DeFrancesco, Raymond and Mary Hague, Carol and Richard Lorenzo, Dorothy Cantone, Kevin L. Jenkins, William, Kathleen, William Jr., and Kimberly Buck, Ronald and Sima Cesarski, Michael and Doris Sckipp, Fran and Rita Galante, Mary and Louis B. Montes, Jane King, Clare Dillon, and Mary Purcell, Plaintiffs-Appellees, Celebrity Cruises, Inc., and Fantasia Cruising, Inc.

Because these cases are not consolidated, motions to dismiss below were made in the following twenty-five (25) appeals:

02-7229 (Lead), 02-7279, 02-7320, 02-7595, 02-7600, 02-7603, 02-7604, 02-7606, 02-7607, 02-7608, 02-7609, 02-7610, 02-7611, 02-7612, 02-7613, 02-7615, 02-7617, 02-7619, 02-7643, 02-7667, 02-7669, 02-7670, 02-7671, 02-9145, and 02-9207.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Raymond and Mary Ruth Hague ("Hague"), Felice and Frances DeFrancesco ("DeFrancesco"), and Carol and Richard Lorenzo ("Lorenzo"), respectfully request that this Court deny the instant petition for a writ of certiorari since the lower court carefully considered and balanced the *Pioneer* factors all concluded, correctly that Petitioners' failure to timely file the notice of appeal in these cases did not constitute excusable neglect. The lower court's decision was in conformity with the dictates of this Court's ruling in *Pioneer* and in uniformity with sister circuits, and therefore, the petition should be denied.

OPINIONS BELOW

The opinion of the court of appeals is published at 333 F.3d 355 (2nd Cir. 2003) and appears in the Appendix of Petitioner's Petition ("Pet. App.") at 1a-27a. The court of appeal's unpublished order denying the petition for rehearing *en banc* appears at Pet. App. 34a-35a. The unpublished order of the district court is available at 2002 WL 1000949 (S.D.N.Y. 2002) and appears at Pet. App. 28a-33a.

JURISDICTION

The court of appeals granted Respondents' motion to dismiss for lack of appellate jurisdiction on June 25, 2003, and later denied a petition for rehearing *en banc* on August 28, 2003. Shortly thereafter, the court of appeals granted, in part, Petitioners' motion to stay the issuance of the mandate on September 24, 2003. As urged by these Respondents, the stay was conditioned upon Petitioners' timely filing of the instant petition on or before October 14, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the lower court's judgment dismissing Petitioners' appeals.

PROVISIONS INVOLVED

Federal Rules of Appellate Procedure, Rule 4(a)(1)(A) and 4(a)(5)(A), reproduced at Pet. App. 36a-37a.

STATEMENT OF THE CASE

This matter encompasses twenty-two individual cases brought by passengers who fell ill as a result of a 1994 outbreak of Legionnaires' Disease aboard the cruise ship M.V. "HORIZON." After withdrawing from a class action lawsuit early in this litigation, the Respondents stipulated that a single case, *John and Joyce Silivanch v. Celebrity Cruises, Inc., et al.,* would be tried as a 'bellwether' case. *See*, Declaration of John J. Hession In Support of Motion to Dismiss Dated 07/12/02 ¶¶ 9-10, Exhibit 1 (hereinafter "Hession Dec.").[1] The bellwether case determined: (a) the liability of both the Petitioners and the other co-defendants below, Celebrity Cruises, Inc. and Fantasia Cruising, Inc.; (b) the percentage of responsibility among the defendants below, and; (c) an assessment of punitive damages, if any, against the Petitioners. *See*, Hession Dec., Exhibits 1, 2. The bellwether jury found the defendants below liable and further found Petitioners liable for punitive damages based on fraudulent acts. Thereafter, the twenty-one remaining plaintiffs entered into settlement discussions with the defendants or brought their cases to trial on the issue of damages. *See*, Hession Dec., Exhibit 2, at 2-3.

As from the bellwether case, all the other cases settled with the exception of the *Hague* and *DeFrancesco* Respondents. *See*, Hession Dec. ¶ 11. Both the *Hague* and

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[1] The Declaration of John J. Hession In Support of the Motion to Dismiss Dated 7/12/02 is a part of the record below. Sup. Ct. R. 12(7). The declaration refers to exhibits, which served as a *de facto* appendix. We refer herein to both the pertinent declaration paragraphs and the exhibits to which they refer.

DeFrancesco cases were tried before juries, and both juries awarded compensatory damages to these Respondents. These verdicts also entitled the Respondents *Hague* and *DeFrancesco* to a *pro rata* share in the bellwether jury's punitive damages award.

On November 7, 2001, the trial court rendered an Order setting forth the *pro rata* distribution of the punitive damage award among eligible plaintiffs. *See*, Hession Dec. ¶¶ 9, 16. Pursuant to the November 7, 2001 Order, separate Supplemental Judgments were entered in each of the eligible cases reflecting the amount of punitive damages distributed in each case. *See*, Hession Dec. ¶ 16, Exhibits 10, 11. Upon entry of the Supplemental Judgments, all issues were resolved and no other motions or issues were pending before the Court in any Plaintiffs' cases, including *Silivanch*. *See*, Hession Dec. ¶ 18. On November 19, 2001, at the request of counsel for *Silivanch*, the Court issued a Fed. R. Civ. P. 54(b) Order.

Thereafter, on December 7, 2001 at 9:34 in the forenoon, these Respondents exercised their right to Appeal. *See*, Hession Dec.¶ 20, Exhibits 13, 14, 15. In the afternoon of December 7, 2001, which was arguably the final day to file a notice of appeal from the November 7, 2001 Supplemental Judgments, the chambers of the trial court below circulated by facsimile an Order purporting to re-open and stay the finality of almost all the bellwether cases. *See*, Hession Dec. ¶ 22, Exhibit 16.

On January 23, 2002, the trial Court issued a Memorandum and Order addressing certain facets of the December 7, 2001 Order. *See*, Hession Dec. ¶ 24, Exhibit 17. The trial court clarified that the statutory interest rate had changed with the abolishment of the 52 Week Treasury bill. *See*, Hession Dec. ¶ 24, Exhibit 17. On January 28, 2002, individual "Second Supplemental Judgments," which were substantially the same as the November Supplemental

Judgments in the *Hague* and *DeFrancesco* cases, were entered on the docket. *See*, Hession Dec. ¶ 26, Exhibits 21, 22.

Being of the belief that finality was reached in their cases on November 7, 2001, and having filed notices of appeal on December 7, 2001, counsel for these Respondents was then contacted by Staff Counsel's office of the United States Court of Appeals for the Second Circuit in order to set forth a scheduling order for the *Lorenzo* appeal. As the *Lorenzo* Respondents had been denied a portion of the punitive damages by the trial court's November 7, 2001 Order and "Second Supplemental" Judgment, a Notice of Appeal therefore was filed on December 7, 2003. *See*, Hession Dec. Exhibit 30. A teleconference to discuss the *Lorenzo* appeal, was held on February 22, 2002 with Mr. Frank Scardelli, Esq. of the Staff Counsel's office, Mr. Robin Weaver, Esq., counsel for the Petitioners herein, Essef Corporation, Pac-Fab, Inc., and Structural Europe, N.V., Mr. James Hazen, Esq., counsel for Celebrity Cruises, Inc. and Fantasia Cruising, Inc., Mr. Brendan M. Burke, Esq., counsel for Respondents, Raymond and Mary Ruth Hague, Felice and Frances DeFrancesco, and Carol and Richard Lorenzo. *See*, Hession Dec. Exhibit 30.

During the conversation Staff Counsel attempted to set forth a stringent briefing schedule. Mr. Scardelli proposed a date in early March for submission of the Record on Appeal and the Briefs on Appeal. *See*, Hession Dec. Exhibit 30. Counsel for these Respondents, Mr. Burke, objected to the early date and explained to Mr. Scardelli that additional appeals might be filed as Second Supplemental Judgments had been entered on the docket in the district court on January 28, 2002 *See*, Hession Dec. Exhibit 30.

Mr. Burke further explained to Mr. Scardelli that other parties were expected to file notices of appeal from the

Second Supplemental Judgments. *See*, Hession Dec. Exhibit 30. Because of a rather extensive record, Mr. Burke indicated that it was preferable for the court to delay the briefing schedule in the *Lorenzo* appeal so that it could be ascertained whether or not any other parties would be filing a Notice of Appeal from the January 28, 2000 judgments. *See*, Hession Dec. Exhibit 30. The postponement of entering a scheduling order in *Lorenzo* was requested for the sake of judicial and real economy, so that one joint appendix could be compiled for use in any related appeals. *See*, Hession Dec. Exhibit 30.

When pointedly asked by Staff Counsel whether they intended to appeal, both Mr. Weaver and Mr. Hazen *refused* to disclose their clients' intentions regarding the filing of any future notices of appeal. *See*, Hession Dec. Exhibit 30. In the context of scheduling a future scheduling conference date, when asked by Staff Counsel, Mr. Hazen suggested that March 4, 2002 was the deadline to file appeals from the Second Supplement Judgments. *See*, Hession Dec. Exhibit 30.

Because the Second Supplemental Judgments were entered on the district court's docket on January 28, 2002, Petitioners in reality only had until February 27, 2002 to file notices of appeal from those judgments. As the record reflects, the Petitioners did not file their notice of appeal until March 1, 2002. When the Petitioners did file their Notice of Appeal, they only filed an appeal of the *Silivanch* Second Supplemental Judgment. Upon realizing that the March 1, 2002 notice of appeal was untimely filed, Petitioners then filed a motion which the trial court deemed filed on March 29, 2003, requesting, *inter alia*, an extension of time to file their appeals pursuant to Fed. R. App. P., Rule 4(a)(5). Following a hearing, the motion was granted on May 15, 2002. Petitioners and their co-defendants below filed these several appeals in June of 2003. In July of 2003, these Respondents, as well as other Respondents, filed motions to dismiss for lack of appellate jurisdiction. That motion was

granted on June 25, 2003. A motion for rehearing *en banc* was made and, thereafter, denied on September 24, 2003. The instant petition was filed on October 17, 2003.

REASONS FOR DENYING THE PETITION

The facts of the instant matter are neither novel nor representative of any split among the circuits in the application of the *Pioneer Investment Services Co. v. Brunswick Associates Ltd Partnership*, 507 U.S. 380 (1993) "excusable neglect" test. Rather, this case is simply one of garden-variety attorney neglect based on inexcusable mistake, namely, Petitioner's failure to consult a calendar to calculate the Fed. R. App. P., Rule 4(a)(1)(A) thirty-day deadline for filing a notice of appeal. This resulted in Petitioners' misapplication of a clear and unambiguous procedural rule which is inexcusable under *Pioneer*.

The opinion of the court below thoroughly discussed and properly applied all four 'excusable neglect' considerations as announced in this Court's *Pioneer* opinion. The Petitioners' argument seriously misconstrues the decision of the Second Circuit by stating that the lower court only considered one of the *Pioneer* factors, 'the reason for delay.' This is entirely inaccurate.

Moreover, there is no split in authority as alleged by Petitioners. The wisdom of the *Pioneer* test is that it is quite flexible and certain factors of the test will favor certain parties depending of the type and context of the case to which it is applied. Petitioners argue that this results in a split among the circuits, but there is no such conflict in circuit authority. Rather, the alleged 'split' is simply the result of case-by-case analysis by the several circuits to vastly different facts under consideration.

Incongruously, Petitioners argue for "uniformity" in the application of *Pioneer*, while the very essence of *Pioneer* is that there no longer is any 'hard line' uniformity for determining what constitutes 'excusable neglect.' *Pioneer* represents flexibility, leaving the determination of 'excusable neglect' to the discretion of the lower courts in deciding whether a particular omission or commission is sufficient for a finding of 'excusable neglect.' Just as each case is different, so too is the balancing of the *Pioneer* factors. In some cases certain factors will have little balancing value, in others, the same factors will 'tip the scales', so to speak. *Pioneer* requires an equitable and flexible determination of 'excusable neglect' to be made by lower courts, as was done in this matter.

STANDARD OF REVIEW ON WRIT OF CERTIORARI

Supreme Court Rule 10 which lists the reasons the Court will consider in deciding whether to grant a petition for writ of certiorari states the following:

Rule 10. Considerations Governing Review on Certiorari

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Although the Petitioners herein have not stated under which of these provisions their petition should be considered, it can only be based on the provision for review under 10(a) where a court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. As more fully discussed below, Petitioners misinterpret the decisions of courts of appeals which have applied this Court's rule in the *Pioneer Ins Services Co. v. Brunswick Associates*, 113 S. Ct. 1489, 123 L.Ed. 2d 74, to argue that a split among the circuits has occurred. No such conflict exists.

Furthermore, Petitioners argument that the Second Circuit Court of Appeals decision in *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2d Cir. 2003) "restructures" the excusable neglect test this Court established in *Pioneer* asserts, at best, a misapplication of a properly stated rule of law by the circuit

court in that case. Accordingly, this Court should decline to review the decision below.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS ON THE MATTER OF 'EXCUSABLE NEGLECT:.

Petitioners have misconstrued the various decisions by the Circuit Courts in applying the *Pioneer* factors as resulting in a conflict among the Circuits on the matter of finding 'excusable neglect.' The fact is that *Pioneer resolved* the conflict among the circuit courts as to what must be shown before a finding of excusable neglect can be made under F.R.A.P.4 (a)(5) and other federal statutes. As a result, the Circuit Courts now apply a uniform test, the one established by this Court in *Pioneer*, which involves a consideration of four well known factors. Naturally, one or more of those factors determines the outcome of each particular case, depending on the circumstances presented by the case under consideration. Necessarily, because there is no "bright line" standard, the same *Pioneer* factor, or combination of factors, is not given the greater weight by any circuit in all cases. This approach clearly adheres to the *Pioneer* principle. It does not nearly approach a conflict among the Circuits regarding how "excusable neglect" is measured.

As is well known, prior to this Court's decision in *Pioneer Ins. Services Co. v. Brunswick Associates*, 113 S.Ct. 1489, 123 L.Ed 2d 74 (1993), some circuit courts, including the Second Circuit, required that in order to be excused, the reason for a delay in filing outside a clearly stated filing date could only have resulted from unique or extraordinary circumstances which were beyond the control of the party seeking to be excused. *See, e.g., Pontarelli v. Stone,* 930 F.2d 105 (1st Cir. 1991); *Rivera v. Puerto Rico Tel. Co.,* 921 F.2d 393 (1st Cir. 1990); *650 Park Ave Corp. v. McRae*, 836 F.2d

764 (2nd Cir.1988); *Airline Pilots Inc. v. Executive Airlines, Inc.*, 569 F.2d 1174 (1st Cir. 1978).

Other circuit courts adopted a far more liberal policy to excuse late filing which were the result of the culpable negligence of a party or its attorneys. Those courts considered such factors as the length of delay in filing, the prejudice or lack of prejudice caused to the other parties, whether there was evidence of bad faith by the moving party, the effect on judicial administration and others. *See, e.g., Lorenzen v. Employees Retirement Plan of Sperry Hutchinson Co*, 896 F.2d 228 (7th Cir. 1990); *In re Centric Corp*, 901 F.2d 1514 (10th Cir. 1990) *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3rd Cir. 1987).

The *Pioneer* decision resolved that conflict by holding that a more flexible rule should be employed in order to determine whether a party's late filing was due to excusable neglect. *Pioneer* 113 S.Ct. at 1491. The *Pioneer* majority established the well known four factors that courts should consider in deciding whether a delay was excusable.[2] These are: whether the movant acted in good faith; the existence of prejudice to the non-movant should late filing be permitted; the effect of the late filing on judicial economy; and finally, the reason for the delay in filing. *Pioneer* Id. 113 S.Ct. at 1498.

After the *Pioneer* decision was announced, the previously existing division among the circuit courts on the issue of "excusable neglect" was resolved, and the courts now

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[2]The *Pioneer* decision construed the "excusable neglect" exception allowed for late filings in bankruptcy proceedings under Bankruptcy Rule 9006(b)(1). The same four part test which was established by the *Pioneer* court was subsequently extended to the "excusable neglect" exception provided by F.R.A.P. 4 by the Court in *Stutson v. U.S.*, 116 S.Ct. 600, 133 L.Ed. 571 (1996).

universally apply the four-part test, which the *Pioneer* majority established.[3] *Graphic Communications, Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, (1st Cir. 2001)("We have recognized that *Pioneer* marked a shift in the understanding of excusable neglect"). All the circuit courts, including the Second Circuit, came to the same conclusion. See, e.g., *Robb v. Norfolk & W. Ry. Co.*, 122 F. 3d 354, 359 (7th Cir. 1997) ("*Pioneer* broadened the definition of 'excusable neglect'"); *United States v. Thompson,* 82 F. 3d 100, 702 (6th Cir. 1996) (*Pioneer* establishes "a more liberal definition of what constitutes excusable neglect when an individual seeks a motion for an extension of time in the district court under Fed. R. App. P. 4"); *Pink v. Union Cent. Life Ins. Co.*, 65 F.3d 722, 724 (8th Cir. 1995) (*Pioneer* "established a more flexible analysis of the excusable neglect standard"); *United States v. Hooper*, 9 F.3d 257, 258 (2nd Cir. 1993) (*Pioneer* advances "a more lenient interpretation" of excusable neglect).

As would be expected, the various circuit courts in considering the four *Pioneer* factors have necessarily given different weight to these factors depending on the individual circumstances of the particular case under review. This approach is in keeping with the *Pioneer* rule, and clearly does not comprise a conflict among the circuits requiring Supreme Court intervention.

For example, in the case under consideration, *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2nd Cir. 2003), the

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[3] The *Pioneer* court noted that the policy to permit courts to accept late filing not only caused by circumstances beyond a party's control under BR 9006(b)(1), was in accord with the underlying policies of the Chapter 11 bankruptcy statute and the bankruptcy rules which entrust the courts with broad equitable powers in order to ensure the success of a debtor's reorganizations. (113 S.Ct. at 1491 *supra*). It is submitted that there are obviously no such policy considerations involved in the Petitioners' case here.

panel recognized that prior to the Supreme Court's decision in *Pioneer*, the Second Circuit adhered to the more stringent rule that the excusable neglect standard could never be met by a showing of inability or refusal to comprehend the plain language of the federal rules. *Silivanch,* 33 F.3d at 365. The court acknowledges that this is no longer the rule, and specifically recognized that inadvertence, ignorance of the rules, or mistakes in construing the rules, may now be excused in some circumstances. However, it also recognized that "the equities will rarely if ever favor a party who fail[s] to follow the clear dictates of a court rule…and where the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Silivanch*, Id at 366-67.

The *Silivanch* panel clearly recognized that in *Pioneer*, this Court had established a more liberal standard for determining whether there had been excusable neglect, and referred to a number of their earlier decisions in which *Pioneer's* "more liberal" definition of excusable neglect was applied. *Silivanch*, 33 F.3d at 366, *citing*, *Canfield v. Van Atta_Buick/GMC Truck, Inc.*, 127 F.3d 248, 249-50 (2nd Cir. 1997) (*per curiam*), *cert. den.*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 117 (1998); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994), *cert denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed. 2d 117 (1998); *United States v. Hooper*, 9 F. 3d 257, 259 (2d Cir. 1993) (applying *Pioneer* to extensions of time to file notices of appeal under F.R.A.P. 4(b), and noting that "nothing…limits its interpretation…to the Bankruptcy Rules").

Noting that this Court referred to excusable neglect as an "elastic concept," the Second Circuit in *Silivanch* explained that in applying the *Pioneer* factors to the typical Fed. R. App. P. Rule 4(a)(5) case, the first two factors will always favor the moving party:

> [D]elay always will be minimal in actual if not relative terms, and the prejudice to the non-movant, will often be negligible, since the Rule requires a 4(a)(5) motion to be filed within thirty days of the last day for filing a timely notice of appeal." *Lowry v. McDonnell Douglas Corp.* 211 F.3d 457, 463 (8th Cir.), *cert denied*, 531 U.S. 929, 121 S.Ct. 309, 148 L.Ed.2d 248 (2000). And rarely in the decided cases is the absence of good faith at issue. *See*, *Id.* But despite the flexibility of "excusable neglect" and the existence of the four-factor test in which three of the factors usually weigh in favor of the party seeking the extension, we and other circuits have focused on the third factor: "the reason for the delay, including whether it was within the reasonable control of the movant." *Pioneer*, 507 U.S. at 395, 113 S.Ct. 1489. We have noted that the equities will rarely if ever favor a party who "fail[s] to follow the clear dictates of a court rule" and held that where "the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250-51 (holding not clearly erroneous the district court's decision that a lawyer's failure to file motion papers within the time limit established by a local rule was not excusable neglect under Rule 60(b)); *United States v. Hooper*, 43 F.3d 26, 28-29 (2d Cir. 1994) (per curiam) ("*Hooper II*") (affirming denial of Rule 4(b) extension where delay resulted from legal assistant's ignorance of rules).

Silivanch, at 366, 367.

The *Silivanch* Court referred to the *Graphic Communications* decision, where the United States Court of Appeals for the First Circuit observed:

> Although the *Pioneer* standard is more forgiving than the standard in our prior case law, there still must be a satisfactory explanation for the late filing… [T]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry.

Silivanch, at 367, *citing*, *Graphic Communications*, , 270 F.3d 1, 5 (1st Cir. 2001)

Certainly the courts' holdings in *Silivanch* and in *Graphic Communications* fully comport with the Supreme Court's confirming that "inadvertence, ignorance of the rules, or mistakes construing the rules *do not usually* constitute 'excusable' neglect," *Pioneer*, 507 U.S. at 392, 113 S.Ct. 1489 *(emphasis added)*.

That other circuit courts in other specific cases find one or more other of the four *Pioneer* factors controlling, clearly does not establish the type of multiple and mature splits among the circuits which the Petitioners argue warrant granting certiorari in this case. It is submitted that a faithful application of the Pioneer rule by the circuit courts will *necessarily* result in different factors controlling in different cases.

For example, the Court of Appeals for the Eleventh Circuit in the case of *In re Worldwide Web Systems, Inc.*, 326 F.3d 1291 (11th Cir. 2003), considered whether to vacate under Fed. R. Civ. P. Rule 60(b)(1) the default judgment of an individual who failed to answer the trustee's complaint alleging a preferential transfer of funds. The panel declined to set the default aside, noting that to establish excusable neglect under Fed. R. Civ. P. Rule 60 (b)(1), the defaulting party must show that it had a meritorious defense to the

complaint, which might have affected the outcome, *in addition to* the court's consideration of the *Pioneer* factors. Since the circuit court found that the movant "has not offered anything resembling a meritorious defense..." and had "inexplicably failed to appear at a hearing set by the court to address his claim that the $1.8 million default judgment should be set aside..." the default judgment would not be set aside, *In re Worldwide Web Systems* at 1296. The court further noted that "while the absence of prejudice to the non-moving party and to the interest of efficient judicial administration are of 'primary importance'," the *Pioneer* decision does not alter the fact that a determination of excusable neglect is an equitable one that necessarily involves consideration of all the relevant circumstances, including the existence of a meritorious defense, lack of prejudice and "a good reason for not responding to the complaint – and not, as *Valdez* argues, exclusively prejudice." *Id.* at 1298. This is precisely the Court's holding in *Pioneer*. *See, Pioneer*, 507 U.S. at 395, 113 S.Ct. at 1498. Indeed, it is also the rule followed by the Second Circuit Court of Appeals in *Silivanch*, (*See,* 333 F.3d at 366).

Likewise, in the case of *In re Eagle Bus Mfg., Inc.,* 62 F.3d 730 (5th Cir. 1995), another bankruptcy proceeding, the court noted that since there would be no prejudice to the debtor by allowing late filing of creditor's proofs of claim, there would be no substantial delay so as to adversely effect the administration of the case and there was *a good reason* provided for the delay in filing, the court would allow the claimants to file untimely proofs of claim "based on the specific facts of this case" *In re Eagle Bus*, 62 F.3d at 739, 740.

Additionally, although the District of Columbia Court of Appeals in *Yesudian ex rel. U.S. v. Howard University*, 270 F.3d 969 (D.C. Cir. 2001), found there was no abuse of discretion by the District Court in its "case management

decision" to allow the late pleading of a defense, even though the District Court made no specific finding of excusable neglect, the panel conducted the *Pioneer* analysis, and concluded that each factor favored the moving party. Consequently, the court of appeals would not reverse the district court's decision to allow the late pleading. *Yesudian* at 971.

Later, in the case of *In re Vitamins Antitrust Class Actions*, 327 F. 3d 1207, (D.C. Cir. 2003), the District of Columbia Circuit Court granted a party's untimely application to opt-out of a class action settlement for excusable neglect, even though the delay was caused by "factors within the party's reasonable control." The court noted that the district court found that the other three *Pioneer* factors outweighed the reason for the delay factor, and affirmed the district court's case management decision to permit the party to opt-out. In doing so, the panel distinguished those cases such as *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457 (8th Cir. 2000) and *Advanced Estimating Systems Inc. v. Riney*, 130 F. 3d 996 (11th Cir. 1997), which involved an attorney's failure to file a timely notice of appeal, which was not excused, due to counsel's misapplication of clear and unambiguous procedural rules. Those cases, the panel noted, involved an attorney's failure to file a notice of appeal, just as in the present case. The court noted that failure to file a timely notice of appeal was an issue of special interest to the courts of appeal, *citing, Lowry*, 211 F.3d at 458, and was readily distinguishable from a case management decision by the district court in a complex class action, such as occurred in the *In re Vitamins Action* case.

The *Silivanch* case also involves counsel's misapplication of a clear and unambiguous procedural rule and not a case management decision by the district court in complex litigation.

In the *In re Orthopedic Bone Screw Products Liability* case, 246 F. 3d 315 (3rd Cir. 2001), also a class action suit, the Third Circuit Court of Appeals found all four Pioneer factors to exist. Under the circumstances of that case, it found excusable neglect, and consequently it reversed the district court's decision excluding a claimant from sharing in a class action settlement fund simply because he failed to meet the registration deadline.

In the context of criminal proceedings, this Court has noted that the "liberal understanding of 'excusable neglect' announced in *Pioneer* is especially applicable in criminal appeals under F.R.A.P. 4(b), *Stutson v. U.S.*, 116 S.Ct. 600, 602, 133 L.Ed 2d 571, 573 (1996). Following that guidance, the Court of Appeals for the Sixth Circuit in *U.S. v. Thompson*, 82 F.3d 700 (6th Cir. 1996) simply remanded a prisoner's motion for permission to file a notice of appeal of his conviction pursuant to F.R.A.P. 4(b), so the district court could evaluate the "motion under the expanded definition of excusable neglect..." under *Pioneer* and *Stutson*. *U.S. v. Thompson* 82 F.3d at 702, 703. Although the court stated in *Thompson* that when requesting an extension of time a party must first show excusable neglect, and if found to exist, the court must then examine the issues of prejudice to the non-movant and judicial administration, *Thompson* at 702. Reading the entire decision, it is clear that the Sixth Circuit Court recognized that *Pioneer's* expanded four part test of excusable neglect was controlling. That being so, it is clear that the courts in the Sixth Circuit will also look to the four *Pioneer* factors and apply them, as appropriate, in the exercise of their discretion, as do the courts of all the other circuits.

U.S. v. Brown, 133 F. 3d 993 (7th Cir.1998) was another criminal case where the Seventh Circuit Court of Appeals simply declined to overturn the district court's decision to permit late filing of a notice of appeal under F.R.A.P. 4(b),

"in a close case," where all four *Pioneer* factors were considered and weighed by the district court, *Brown* at 997. This decision also illustrates that the circuit courts universally look to the *Pioneer* rule when determining whether excusable neglect exits. It is therefore natural to expect that, on the facts of each particular case, one or more factors will weigh more heavily over the others, in keeping with this Court's guidance in *Pioneer*.

The same can be said with respect to the decision of the Eleventh Circuit Court of Appeals in *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996). Although Petitioners contend that this case provides another example of a split among the circuits, the *Cheney* court merely found that when all four *Pioneer* factors were weighed, the equities required a finding that failure to file a demand for trial *de novo* within 30 days after issuance of an arbitration award was due to excusable neglect. Since the court of appeals found that the district court failed to apply the *Pioneer* standard to the circumstances of the *Cheney* motion, the panel found this to be an abuse of the district court's discretion, and reversed. Although the *Cheney* court commented that this Court, in *Pioneer,* accorded primary importance to the absence of prejudice to the non-movant and to the interest of efficient judicial administration in the *bankruptcy context presented by Pioneer*, it is clear that there is nothing in the *Pioneer* decision which requires the courts to give greater weight to any one or more of the factors discussed, nor do the circuit courts which apply *Pioneer* consider that to be required. Rather, the decisions since *Pioneer* reflect a balancing of the four factors in an equitable way, considering all the circumstances presented by each case, to reach a determination whether, in the exercise of its discretion, a court will excuse the failure to act in a timely fashion. That different courts have considered different factors to be more important under the circumstances of individual cases fully comports with this Court's directive in *Pioneer*.

Furthermore, that the Second Circuit in *Silivanch*, the Eight Circuit in *Lowry*, 211 F. 3d at 464, the Fifth Circuit in *Midwest Employers Case*., 161 F. 3d 877, 879-880 (5th Cir. 1998), the Eleventh Circuit in *Advance Estimating Systems, Inc.*, 130 F. 3d 996, 998 (11th Cir. 1997), the Seventh Circuit in *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132,133-134 (7th Cir 1996); and the Ninth Circuit in *Kyle v. Campbell Soup Co.*, 28 F. 3d 928 (9th Cir. 1994), do not excuse an attorney's inexplicable lapses in failing to meet a filing date, and does not create a conflict among the circuits so as to require further guidance from this Court about excusable neglect. These rulings clearly comport with this Court's recognition that "inadvertence, ignorance of the rules, or mistakes construing the rules *do not usually constitute `excusable neglect`*..." *Pioneer*, 113 S.Ct. at 1496 *(emphasis added)*. Indeed, if the type of neglect which Petitioners seek to have excused here is accepted, as other circuit courts have observed, it would be hard to fathom a case where *inexcusable neglect* exists. *Lowry*, 211 F.3d at 364; *Prizevoits v. Indiana Bell Tel. Co.*, 76 F. 3d at 133-34 *(emphasis added)*.

The Second Circuit had it exactly right when it noted that in applying the *Pioneer* factors, the equities will rarely, if ever, favor a party who fails to follow the clear dictates of a court rule, and held that where "the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Silivanch*, 333 F.3d at 366-67; *Canfield*, 127 F.3d at 250-51.

II. THE WELL REASONED OPINION BELOW REFLECTS THE CORRECT APPLICATION OF THE *PIONEER* EXCUSABLE NEGLECT FACTORS.

A. The Second Circuit Considered, And Balanced The *Pioneer* Factors Properly, Finding Petitioners' Negligence Was Inexcusable.

The Second Circuit did not merely recite the *Pioneer* factors and find only one dispositive. Even a brief perusal of the Second Circuit's thoroughly reasoned decision discloses that the lower court did, in fact, consider *all* four *Pioneer* factors before concluding that one factor, the reason for delay, *outweighed* all other factors.[4]

The *Silivanch* court then discussed each of the factors. Beginning with the first two factors, the Court noted that, "[d]elay will always be minimal in actual if not relative terms, and prejudice to the non-movant will often be negligible, since the Rule requires a 4(a)(5) motion to be filed within thirty days of the last day of filing a timely notice of appeal." *Silivanch v. Celebrity Cruises, Inc.*, 333 F3d 355, 366 (2nd Cir. 2003), *citing*, *Lowery v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir.) *cert. denied*, 531 U.S. 929, 121 S.Ct. 309, 148 L.Ed.2d 248 (2000). Turning to the fourth factor, the panel commented, that "...rarely in the decided cases is the absence of good faith at issue." *Silivanch* at 366.

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[4] Again, the four factors are: "[1] the danger of prejudice to the [non-movant]; [2] the length of delay and its potential impact on judicial proceedings; [3] the reason for the delay; including whether it was within the reasonable control of the movant; and [4] whether the movant acted in good faith." *Silivanch v. Celebrity Cruises, Inc.*, 333 F3d 355, 366 (2nd Cir. 2003), *citing*, *Pioneer Inv. Services Co. v. Brunswick Associates*, 507 U.S. 380, 396, 113 S.Ct. 1489, 1498 (1993).

Overall, the panel gave Petitioners *broad* latitude in their analysis, concluding that three of the *Pioneer* factors favored Petitioners and *not* these Respondents. *Silivanch* at 368. Because the appellate court found that the delay, prejudice and good faith factors favor Petitioners, the court turned to the third factor, "the reason for the delay, including whether it was within the reasonable control of movant." *Id.* at 366.

In discussing the 'reason for delay' factor, the appellate court observed: "We have noted that the equities will rarely if ever favor a party who 'fail[s] to follow the clear dictates of a court rule' and held that where 'the rule is entirely clear, we will continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test.'" *Silivanch* at 366-67, *quoting*, *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 249-50 (2nd Cir. 1997) (*per curiam*), *cert. denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 117 (1998).

Petitioners argue that their trial counsel was "lead to believe" by Celebrity's counsel that the deadline for filing a notice of appeal from the January 28, 2002 Second Supplemental Judgments was March 4, 2003. Instead, the actual deadline day for filing was February 27, 2003. Petitioners' counsel has represented that he was aware of the thirty-day time limitation for filing a notice of appeal, but argues that his reliance upon the comment of Celebrity's counsel during the February 22, 2003 telephone conference with Staff Counsel - instead of reliance on his calendar - constitutes a mistake rising to the level of 'excusable neglect'. As noted by the court of appeals, "[i]n our view, a lawyer's dependence entirely on a statement made under such circumstances in determining the filing deadline for a notice of appeal is not 'excusable' as we have used that word in related contexts." *Silivanch* at 367.

B. Petitioners' Failure To Follow A Clear Rule Of Court Was Not Excusable Neglect Where The Failure Was Wholly Caused By Petitioners Own Neglect.

Petitioners fail to fully appreciate this Court's holding in *Pioneer* by focusing only on the third factor's "reason for delay" language, and ignoring the impact of the language of the complete holding, which adds, "including whether it was within the reasonable control of movant" *Pioneer* at 1498. Clearly, the reasonableness portion of the fourth factor weighed so heavily against Petitioners, that not even the remaining three factors, held to favor Petitioners, mitigated against the stated reason for delay.

In most reported cases, delay is usually caused by mistakes in interpreting or understanding the law. The lower court opinion in this case refers to numerous cases where mistakes of law had been the cause of the delay, such as a misinterpretation of court rules. *See, e.g. Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248 (2nd Cir. 1997)(Motion to extend time denied where attorney was preoccupied with other affairs, no excusable neglect found where mistake of law in understanding rules); *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994), *cert denied,* 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed. 2d 117 (1998)(Motion to extend time denied where prior notice of appeal was nullified, requiring filing of a second notice of appeal following disposition of post-trial matters. Though a "trap" rule which has since been amended, no excusable neglect found on mistake of law); *United States v. Hooper*, 9 F.3d 257 259 (2nd Cir. 1993)(Denial of motion to extend time where legal assistant's mistake of law caused delay).

However, as framed by Petitioners, this matter involves Petitioners' neglect in calculating the correct date for filing a notice of appeal. Petitioners essentially argue that because

this matter involves a mistake of fact, and not a mistake of law, they should be given more leniency under the *Pioneer* analysis.

This position is untenable. Indeed, as the Second Circuit noted in the opinion below:

> One might attempt to distinguish our decided cases from the ones before us on the ground that they involve mistakes of law and this appeal involves a mistake of fact.... But we think that in this case, at least, it is a distinction that is difficult to sustain and is of little value.

Silivanch at 370. The Second Circuit, however, did address Petitioners' position regarding a differing treatment of a mistake of fact in this matter versus a mistake of law in decisional authority. The panel observed:

> In any event, we see no reason to consider similarly neglectful conduct differently when it is a mistake of law rather than a mistake of fact. We find no justification for treating this case differently than Hooper II, for example, simply because in that case a legal assistant mistakenly thought that the rule called for a thirty rather than a ten day limitation, whereas here, counsel knew there was a thirty day limitation, but neglected to consult a calendar to determine when it expired."

Silivanch at 369.

In view of the absence of *any* effort on the part of Petitioners' counsel to comply with the rules, the time limitations of which he was fully aware, such lack of effort to simply consult a calendar provides no sufficient reason for excuse.

C. A Court May Not Give Carte Blanche Extensions of Time Under *Pioneer*.

Mindful of the omission of Petitioners' counsel in failing to calculate the time limitations for filing a notice of appeal, it is unclear what, if any, standard could be applied which, short of excusing all missed deadlines, would render a different result for Petitioners.

As noted by the Court of Appeals for the Ninth Circuit, "[i]n light of its interpretation of "neglect" as "negligence", the [Supreme] Court said that the "excusable" portion of the term would *provide limitations necessary to prevent abuse* by the parties." *Briones v. Riviera Hotel & Casino*, 116 F. 3d 379, 381 (9th Cir 1997) *(emphasis added)*. Indeed, even under the liberal Pioneer standard, the Court of Appeals for the Sixth Circuit cautioned that, "a district court should not *carte blanche* grant motions for extensions of time under Fed. R. App. P. 4. *U.S. v. Thompson*, 82 F.3d 700, 702 (6th Cir. 1996) *(emphasis added)*.

Somewhat recently, in discussing the "reason for delay" factor, the Bankruptcy Court for the Eastern District of Michigan noted:

> This remaining factor has been referred to as the "law practice upheaval" or "extremely busy" factor. That is a factor which has been emphasized in various cases (and this case as well) that have found the neglect inexcusable, with an overlay in this case to the effect that counsel for Debtors is a sole practitioner and was spending much of his time during the 10- day appeal period in this Court in hearings on various aspects of this very same bankruptcy case. The Supreme Court in *Pioneer* and later lower court cases in this circuit have given the 'law practice upheaval'

> excuse short shrift, or, in the words of the Supreme Court itself, such is deserving of 'little weight.'

In re Bli Farms, 294 B.R. 703 (Bankr.E.D. Mich, 2003), *citing*, *Pioneer*, at 398, 1489. Of course, to be certain, under the more flexible *Pioneer* analysis there are situations where attorney neglect is excusable, even where such neglect was capable of avoidance. However, "notwithstanding the 'flexible' *Pioneer* standard, experienced counsel's misapplication of a clear and unambiguous procedural rule cannot excuse [a] failure to file a timely notice of appeal." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000).(Where counsel had actual notice of entry of judgment and failed to file timely notice of appeal.)

Pioneer requires more than an excuse, it requires a *satisfactory* excuse. Thus, in a case where counsel filed a notice of appeal one day late because of office inattention and belief that rule permitted 60 day deadline rather than 30 days, the Ninth Circuit observed:

> Although the *Pioneer* standard is more forgiving than the standard in our prior case law, there still must be a *satisfactory* explanation for the late filing.... This Court therefore concludes that the Plaintiff's motion must be denied. To find this neglect "excusable' would only serve to condone and encourage carelessness and inattention in practice before the federal courts, and render the filing deadline set in Fed. R. App. P. 4(a)(1) a nullity.

Graphic Communications, Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 5 (1st Cir. 2001) *(emphasis added)*.

Petitioners vigorously argue that the lower court placed too great an emphasis on only one of the factors, to the

detriment of the "balancing" aspects of the *Pioneer* analysis. Yet, at bottom, what Petitioners essentially seek is a *per se* rule that mistakes of fact are always excusable. As noted by the eighth circuit in *Lowry v. McDonnell Douglas Corp*:

> Balancing tests naturally produce indeterminacy; focusing on one factor may change the balance, and, in turn, the result.... [T]he reasons behind some delays will be unexcused no matter what the countervailing factors....

Lowry, 211 F.3d 457, 463, *citing*, *Prizevoits v. Indiana Bell Telephone Co.*, 76 F.3d 132, 133 (7th Cir 1996); *Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson, Co.*, 896 F.2d 228, 233 (7th Cir. 1990).

It is all but elementary that the evaluation of the particular facts of a case may, at times, cause one factor to be out of balance with the other three. This is especially true when the reason for delay is a mistake of fact, where the mistake was cause by the very party seeking to have the same mistake considered 'excusable neglect.'

As held last month by the Supreme Court of Vermont in following the 'excusable neglect' holding of the circuit court in *Silivanch*, "[m]any federal courts have taken what we think is an appropriately hard line when it comes to determining when neglect that stems from factors totally within the control of a party or its attorney is 'excusable'." *In re Town of Killington*, 2003 WL 22416506 (Vt. 2003), *citing*, *Silivanch*, 333 F.3d 355.

Notably, Petitioners fail to point to anything in the record that would undermine the lower court's alleged "focusing" on the *Pioneer* delay factor. Petitioners turn a blind eye to the fact that the lower court found all three other factors to favor Petitioners. Indeed, there is nothing in the record that might tend to demonstrate that the tribunal should have given more

weight to the other three *Pioneer* factors then they already had given. Nothing in these cases was overlooked, nor are these matters so unique or novel as to warrant review by this Court.

The Second Circuit carefully considered and balanced all four *Pioneer* factors, correctly concluding that Petitioners' failure to timely file the notice of appeal in these cases did not constitute excusable neglect. As the lower court's decision was in conformity with the dictates of this Court's ruling in *Pioneer* and in uniformity with sister circuits, the petition should be denied.

CONCLUSION

Although the decision below is adverse to Petitioners, if the excusable neglect standard is not to be rendered wholly superfluous, where the facts of neglect are so egregious as they are here, the proper application of the *Pioneer* excusable neglect standard all but demands that appellate jurisdiction be denied.

Respectfully submitted,

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Dated: NEW YORK, NEW YORK
NOVEMBER 17, 2003

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